compensation, "public filing of these contracts enables weaker affiliates to ensure that they receive comparable or competitive compensation . . . thereby strengthening their overall financial condition and ability to serve the public." Notice, p. 16.

Finally, the Notice is only partially accurate with respect to the value of access to these contracts by weaker affiliates. Access to the information assures weaker affiliates only the knowledge about compensation in other markets--they still must negotiate. But this knowledge is helpful. The same is true of non-monetary terms and conditions aimed at improving network/affiliate performance in local markets.

In short, the Commission's filing and disclosure requirements, rather than imposing indirect costs, have positive benefits for the broadcast industry and for the public.

III.

NONE OF THE PROPOSED MODIFICATIONS OF THE RULES IS MERITORIOUS

The Notice contains various alternative proposals for alteration or elimination of the filing and disclosure requirements. Because we believe the fundamental balance between the benefits and costs of the rules is unchanged, we believe there is no basis for modifying the rules. Each of the suggested alternatives is logically or factually flawed or is otherwise without merit.

First, the Notice proposes the elimination of the Commission filing requirement and inquires whether affiliation contracts should be made available upon request from the Commission based upon complaints by affiliates or members of the public. Notice ¶17. It is far-fetched, however, to expect an affiliate to file a complaint against its network short of an

irrevocable rift in the relationship. Not more than a handful of such complaints of any kind have ever been filed in the entire history of the Commission. Affiliates are simply not going to publicly pick a fight with their networks--who are their largest provider of programming (some 70% to 80% for ABC, CBS and NBC affiliates)--and a critically important source of revenue. Upon what grounds, moreover, would an affiliate complain if it wished (as stated in the Notice) to "ensure that it is receiving comparable or competitive compensation to other affiliates . . . "? Notice, ¶16. It is not apparent what substantive grounds would exist for such a complaint. This proposal, in other words, would either eliminate the availability of contract information, generally, or it would create substantial new costs and burdens for affiliates (and for the Commission in adjudicating these access complaints) and members of the public by requiring them to file formal proceedings to gain access to the information. Neither is defensible in terms of efficacy, efficiency or cost or is in the public interest.

Second, the Notice suggests that the filing requirement could be retained but access limited to FCC employees in order to preserve confidentiality. That approach would gut the effectiveness of the rules for affiliates as well as members of the public. On what basis would the Commission reverse its affirmative decision in 1969 that this information should be available pursuant to the Freedom Of Information Act? To do so would be an unacceptable and unjustifiable retreat from the principles underlying the FOIA.

The third alternative for modifying the rules set out in the Notice would be to require that only redacted copies of affiliation contracts be made available to the public. Notice, ¶19. These copies would "omit any references to the values which determine this affiliate compensation and, possibly, other business sensitive terms." Id. This approach would render the rules meaningless,

however, by allowing the salient information to be obliterated. Moreover, it would only be likely to create new controversies and burdens for the Commission in attempting to define and enforce the extent to which information could appropriately be withheld. Again, neither result would be desirable or consistent with the public interest.

CONCLUSION

For the foregoing reasons, the Affiliates respectfully submit that the Commission's affiliation filing and disclosure requirements produce benefits well in excess of any direct or indirect costs and should be retained.

Respectfully submitted,

NETWORK AFFILIATED
STATIONS ALLIANCE

By: _____
Wade H. Hargrove
Counsel to the
ABC Television Affiliates Association

Brooks, Pierce, McLendon,
Humphrey & Leonard
1600 First Union Capitol Center
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300

By: /Kurt Wimmer/WHD
Kurt Wimmer
Counsel to the
CBS Television Affiliates Association

Covington & Burling
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-5278

By: Werner K. Hartenberger /WKH

Werner K. Hartenberger
Counsel to the
NBC Television Affiliates Association

Dow, Lohnes & Albertson
1255 23rd Street
Suite 500
Washington, D.C. 20037
(202) 857-2630

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EXHIBIT B

REPLY COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Part 73 of the Commission's	)	MM Docket No. 95-40
Rules Concerning the Filing of Television	)	
Network Affiliation Contracts	)	

REPLY COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

The Network Affiliated Stations Alliance ("NASA" or "Affiliates") submits the following Reply Comments in response to the Commission's Notice Of Proposed Rule Making, released April 5, 1995 (the "Notice"), in these proceedings.

NASA respectfully submits that the proposal to abolish or dilute the affiliation contract filing rule is ill-founded. The benefits of the rule are substantial. In particular, it promotes the dissemination of information in the marketplace by giving affiliates access to the same information available to the networks and thus aids affiliates in their negotiations and dealings with the networks. This role is all the more important given the intensified efforts by the networks to exercise control over affiliates and their programming decisions. On the other hand, the direct costs of compliance are truly de minimis, and the supposed "indirect" costs discussed in the Notice are, as the comments have shown, speculative rather than real. The affiliation contract filing rule, in short, supports competition as well as diversity and localism in the video marketplace, and its repeal would undermine these important Commission policies.

I. THE AFFILIATION CONTRACTS FILING RULE HAS UNDISPUTED PUBLIC INTEREST BENEFITS WHICH HAVE ONLY GROWN WITH RECENT CHANGES IN THE VIDEO MARKETPLACE

As the Commission pointed out in its Notice, the "major purpose" of the network/affiliate rules has been "to restrict the potential exercise of market power of networks over their affiliates to the detriment of the public." Notice, ¶10. The underlying rationale is that network control over affiliates "is detrimental to the public because such control potentially reduces the diversity of programming available to the public, especially local programming." Id.

NASA in its Comments showed that, notwithstanding various changes in the video marketplace since the rules were last examined in 1985, there has been no change in the fundamental relationship between networks and their local affiliates to warrant weakening of the affiliation contract filing rule. The changes that have transpired, in fact, have rendered the rule all the more vital. Networks have long sought to control and dominate the programming decisions of their local affiliates. With the elimination of the financial interest and syndication rules, the networks have heightened incentives to pressure their affiliates, and they have greater economic clout to bring to bear in doing so.

The networks have, in fact, been exercising that clout. They are now insisting, for example, that new affiliation contracts run for a term of ten years instead of the two-year term customary in the past. They are also including requirements that exact severe economic penalties from affiliates for failure to clear virtually all network programming. If the networks have their way, affiliates will effectively become passive local outlets for delivery of these three or four national entities' programming.

The affiliation contract filing rule is certainly not a total safeguard against network domination of the local airwaves, but it is of some help. It serves at least to give affiliates access to the same body of information concerning the terms of affiliation that the networks automatically possess. The rule thus aids affiliates in their dealings with the networks -- particularly negotiations concerning the terms of affiliation agreements. By maintaining access to this information on both sides of the bargaining table instead of only one, the rule strengthens the hand of the local station. Consequently, the rule supports affiliates in their efforts to provide programming which, in their judgment, responds to the needs and tastes of their local communities.

The comments filed in response to the Notice support this view. AFLAC Broadcast Group, Inc., for example, states in its comments that under the network/affiliate rules as presently constituted, "the networks provide high quality entertainment, sports, and national news programming, which individual stations could not otherwise afford to purchase, while preserving the editorial discretion of local stations to carry programming responsive to their local communities. . . ." AFLAC Comments at 4. The networks are seeking to change that balance in a fundamental way, however, and they are pursuing their agenda in every available forum. As AFLAC states:

> The networks would prefer to own their station outlets or to be in a position to dictate terms to the remaining non-owned affiliates. If the network efforts to achieve a choke hold over their affiliates are successful, it will mean nothing less than the loss of the localism and diversity which are at the heart of the American broadcast system.

AFLAC Comments at 3. At a time when national policy on so many fronts is seeking to empower local voices, the Commission, we respectfully submit, must not facilitate the

consolidation of control over free, over-the-air broadcast outlets in the hands of a few national media players.

This is not a purely parochial concern over who holds the greater bargaining leverage as between networks and affiliates. As demonstrated in the Comments of Media Access Project, repeal of the rule would severely handicap the public's exercise of its right to participate in Commission proceedings to ensure that licensees serve the public interest. Media Access Project in its comments cites important matters now pending before the Commission which could not have been initiated without public access to affiliate contracts. MAP Comments at 3. It concludes that "[r]epeal of the rule would effectively pull out the rug from any attempt by the public to monitor compliance with the rules governing network-affiliate relationships." Id.

Predictably, the networks advance an opposing case, one which touts the "sea changes" occurring in the video marketplace and, in particular, the recent round of affiliation switches. E.g., Comments of CBS Inc. at 3. Certainly the recent transaction in which Fox Television Stations invested $500 million in New World Communications Group in exchange for an affiliation change in 12 New World stations to Fox has spurred a round of affiliation realignments in various markets. There is nothing to indicate that this sequence of events, dramatic though it may have been, represents a fundamental shift in the bargaining relationships between networks and affiliates, however. That a transaction of this kind could stir so much interest, if not shock, only shows that network/affiliate relationships in general are intensely stable. And that stability reflects the continuing

fundamental dependence of most affiliates on their network for programming as well as for financial support.

It is true, moreover, that the number of networks has increased with the emergence of Fox and, more recently, the debut of the United Paramount and WB Networks. Nevertheless, Fox is still emerging and is not yet on a par with the ABC, CBS and NBC networks in terms of audience or programming schedule, and the United and WB networks are at the inception stage. The "growth" in networks, moreover, is overshadowed by the explosion in stations available for affiliation. In 1970 there were three national networks and 82 commercial independent television stations; as of late 1994, there was at most one additional "major" network (Fox) and over 450 independent stations.[1] As pointed out in NASA's initial comments, that is an average of 6.9 stations per market in the top 100 markets. NASA Comments at 9. On average, in other words, the number of potential affiliates well exceeds the number of available networks. Thus, networks continue to have a substantial bargaining advantage in most markets, and that underlying fact is unchanged in the aftermath of the New World/Fox transaction.

In summary, although the broadcast marketplace has in some respects become more dynamic and change undeniably has occurred, the ability of the networks to dominate their affiliates is fundamentally undiminished and their incentives to do so have actually increased. The relevant consideration thus remains whether the rule serves the Commission's policy goals of competition, diversity and localism. The Affiliates submit

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[1] Review of Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, MM Docket No. 94-123, Notice of Proposed Rule Making (Released: October 24, 1994), ¶ 16. The number of independent stations in 1994 includes independent stations affiliated with Fox.

that it does and that its benefits are at least as salient as when the rule was last re-examined.

II. THE COSTS ASSOCIATED WITH THE RULE ARE NEGLIGIBLE OR UNSUBSTANTIATED

The Commission in the Notice suggested that, as against the benefits of the rule, the direct as well as certain "indirect" costs should be weighed. The comments filed in response confirm that neither is of any material consequence.

The direct costs, first of all, are laughably small. Reproduction and mailing of the contract document is hardly a material burden to a Commission licensee. CBS in its comments acknowledges that the burden is "perhaps not. . .significant" on any one station; it contends, however, that the burden is "sizeable" when viewed from the perspective of the industry as a whole, pointing out that approximately 900 stations remain subject to the rule. CBS Comments at 4. Suffice it to say that while the 650 stations represented by NASA appreciate the network's vigilance in this regard, they do not view the contract filing requirement as a sizeable burden. As far as direct costs to the Commission are concerned, the Affiliates would point out that the agency's role in this regard is essentially passive -- in the normal course it does not approve or even review these documents, but rather merely maintains them in order to make them available to the public.

As to "indirect costs," the Commission in the Notice suggested that in certain circumstances making this information available to the public might have the effect of facilitating the ability of networks or of affiliates to "monitor" compliance with anticompetitive understandings. Notice, ¶15. It suggested, for example, that in markets

where there are more stations than networks seeking affiliates the networks might attempt, through parallel action, to lower the compensation they pay potential affiliates and use the contract filing rule to ensure that each is performing as agreed. Id. Conversely, it suggested that in markets where there are more networks seeking affiliates than commercial stations, the stations might attempt to hold out for higher compensation.

These hypothetical scenarios were examined in NASA's Comments and shown to be without factual or logical basis. NASA Comments at 10 - 13. Rather than repeat that discussion here, the Affiliates would merely observe that in the wake of the comments filed in this docket, the theory remains entirely abstract and speculative. Although the networks parrot the hypothetical scenarios discussed in the Notice, their comments are devoid of any factual support or even anecdotal evidence that would tend to substantiate any claimed anticompetitive effect of making this information available to affiliates and the public in addition to the networks. In Sugar Institute v. United States, 297 U.S. 553, 598 (1935), the Supreme Court observed:

> [T]he dissemination of information is normally an aid to commerce. As free competition means a free and open market among both buyers and sellers, competition does not become less free merely because of the distribution of knowledge of the essential factors entering into commercial transactions.

As pointed out in our initial comments, affiliates wish to have access to information concerning their own network and its dealings in other markets to support their efforts to obtain equitable treatment, not to "monitor" some supposed collusion with affiliates of other networks.[2] Their objective is to be a stronger voice in and for their local

[2]Further, to the extent the concern is with possible concerted conduct by networks against affiliates in a market, the members of NASA will accept that risk in return for the real protections afforded by the rule.

communities, and it is thus distinctly procompetitive.

The same can be said of the other "indirect cost" posited in the Notice, i.e., that the rule might discourage networks from developing specialized contractual arrangements in recognition of an affiliate's unique circumstances. Here again, the networks merely repeat the Notice rather than cite any factual examples or experience in support of their position. The networks cite no instances in which the rule, as it exists, has deterred them from entering into such arrangements, nor is its preservation likely to stand in the way of creative and mutually-beneficial solutions to problems faced by affiliates. Far more plausible is that such special arrangements may offer options for addressing problems faced by "weaker" affiliates -- options of which they would be unaware in the absence of the rule.

In summary, none of the supposed costs of compliance with the contract filing rule withstands scrutiny in light of the comments in this proceeding. In particular, the "indirect cost" theory articulated in the Notice, while novel, has not been substantiated in the slightest. To the contrary, the rule's procompetitive benefits to affiliates and to the public are unimpeached on the record.

III. THE ALTERNATIVES TO THE CURRENT RULE SUGGESTED IN THE NOTICE ARE NOT VIABLE

The comments reveal no support (other, of course, than from the networks) for alternatives to the current rule suggested in the Notice. The primary option set out in the Notice -- making affiliation contracts available upon complaint by affiliates or the public -- was characterized by AFLAC as "simply unrealistic." It stated:

> Without a filing requirement, even well-informed members of the general public will not have sufficient information to file such a complaint and it would be extraordinary for an affiliate, except in the most exceptional of circum-stances, to 'rock the boat' by filing a complaint at the Commission against the source of most of its entertainment, sports, and news programming.

AFLAC Comments at 8. AFLAC's is a realistic view. Similarly, MAP characterized this proposal as "wholly unworkable," observing that there would be no mechanism for putting the public on notice of objectionable elements in affiliation agreements.

To replace the contract filing requirement with a "complaint mechanism" would, as a practical matter, eliminate affiliates' access to the information and abolish any potential for Commission oversight of the agreements for conformity with its rules.[3] Without access to the information in the first instance, an affiliate will be unable to determine whether it is being equitably treated, and in all events an affiliated station is highly unlikely ever to file a complaint against its network. Members of the public similarly will have no effective ability to complain if deprived of the information. The "complaint" alternative should be recognized for what it is: the abandonment of any Commission role in this important arena. Accordingly, it should be rejected.

CONCLUSION

For the foregoing reasons, the affiliates respectfully submit that the Commission's affiliation contract filing rule and the attendant disclosure requirements produce benefits

[3]This same conclusion holds for the other alternatives discussed in the Notice. To treat the information as confidential would foreclose access by affiliates and the public. To allow commercial information to be redacted would be tantamount to making the form of the agreement available without the substance. Access in that context would be meaningless.

well in excess of any direct or indirect costs and should, therefore, be retained.

Respectfully submitted,

NETWORK AFFILIATED
STATIONS ALLIANCE

By: _____
Wade H. Hargrove
Counsel to the
ABC Television Affiliates Association

Brooks, Pierce, McLendon,
Humphrey & Leonard
1600 First Union Capital Center
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300

By: Kurt Wimmer /WAH
Kurt Wimmer
Counsel to the
CBS Television Affiliates Association

Covington & Burling
1202 Pennsylvania Avenue, NW
Post Office Box 7566
Washington, DC 20044
(202) 662-5278

By: Werner K. Hartenberger /WAH
Werner K. Hartenberger
Counsel to the
NBC Television Affiliates Association

Dow, Lohnes & Albertson
1255 23rd Street
Suite 500
Washington, DC 20037
(202) 857-2630

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that copies of the foregoing **Reply Comments of the Network Affiliated Stations Alliance** were served on the parties listed below by depositing copies in the United States mail, postage prepaid, this 12th day of July, 1995.

Roger Goodspeed
Capital Cities/ABC Inc.
77 West 66 Street
New York, NY 10023

Richard Cotton
Ellen Shaw Agress
30 Rockefeller Plaza
New York, NY 10112

Howard Monderer
John K. Hane
National Broadcasting Company, Inc.
1299 Pennsylvania Avenue, NW
11th Floor
Washington, DC 20004

Howard Jaeckel
Jonathan Sternberg
CBS Inc.
51 West 52 Street
New York, NY 10019

Craig J. Blakeley
Powell, Goldstein, Frazer & Murphy
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Joseph S. Paykel
Gigi B. Sohn
Andrew Jay Schwartzman
Media Access Project
2000 M. Street, NW
Washington, DC 20036

Harriet K. Shearer